

FEDERAL COMMUNICATIONS COMMISSION

FCC 98-342

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FCC MAIL ROOM

In re Applications of)	MM Docket No. 90-638
)	
HEIDI DAMSKY)	File No. BPH-880816MW
)	
WEDA, LTD.)	File No. BPH-880816NR
)	
HOMEWOOD PARTNERS, INC.)	File No. BPH-880816NU
)	
For Construction Permit for)	
an FM Station on Channel 247A)	
Homewood, Alabama)	

ORDER

Adopted: December 23, 1998

Released: January 6, 1999

By the Commission:

1. This Order denies a Further Petition to Enlarge Issues and to Remand For Further Hearing Proceedings filed July 29, 1998 by Heidi Damsky, which seeks a hearing to determine whether Homewood Radio Co., LLC ("Homewood Radio") knowingly made an ex parte presentation to a member of the FCC staff and whether Homewood Radio is basically qualified to be a Commission licensee. We also deny Damsky's Further Petition for Reconsideration filed September 21, 1998, and dismiss her Emergency Motion for Stay, Pendente Lite filed September 14, 1998.

2. By Memorandum Opinion and Order, the Commission approved a settlement agreement between Homewood Partners, Inc. ("HPI") and WEDA, Ltd. ("WEDA"), and affirmed an initial decision which found that the third applicant in this proceeding, Damsky, was financially disqualified. Heidi Damsky, 12 FCC Rcd 11688 (1998). The settlement provided that HPI and WEDA would merge to form a new entity, Homewood Radio, in which each would have a fifty percent interest. WEDA's application would be amended to substitute Homewood Radio and HPI's application would be dismissed. In a subsequent Order, FCC 98-202, released August 25, 1998, the Commission denied Damsky's first Petition for Reconsideration, filed May 22, 1998, and dismissed an earlier Emergency Motion for Stay, filed June 1, 1998.¹

¹On August 3, 1998 the Mass Media Bureau issued a construction permit to Homewood Radio. Thereafter, on August 13, 1998, Damsky filed an Application for Review, which seeks to set aside the Bureau's action. Damsky requests "rescission of the construction permit until

3. In support of her Further Petition to Enlarge Issues, Damsky relies on a July 14, 1998 letter from David H. Solomon, Deputy General Counsel, to all counsel in this case, which is accompanied by a statement by John I. Riffer, Assistant General Counsel, concerning an oral presentation that occurred in this proceeding.² According to Damsky, John F. Garziglia and Stephen Diaz Gavin, counsel for WEDA and Homewood Partners, respectively, met with Riffer on July 8, 1998 and falsely informed him that the matter they wished to discuss was not covered by the ex parte rules. Damsky asserts that counsel then sought to persuade Riffer to tell the Mass Media Bureau to issue a construction permit to Homewood Radio. Noting that she had filed a motion to stay the proceeding pending Commission action on her Petition for Reconsideration, see ¶ 2, supra, Damsky argues that the ex parte presentation was deeply prejudicial to Damsky's interests. Damsky asserts that her counsel was not notified of the meeting or given an opportunity to attend. Accordingly, Damsky concludes that the facts adversely impact Homewood Radio's qualifications to be a Commission licensee.

4. In opposition to Damsky's request, Homewood Radio argues that Damsky has not demonstrated a substantial likelihood of proving disqualifying misconduct so as to justify reopening the record for further hearing. Specifically, Homewood Radio contends that it did not make an ex parte presentation at the July 8 meeting. It states that it requested the meeting because it was concerned that the Bureau had not issued a construction permit for the station, even though the Commission had granted its application two months earlier, and that the Bureau might not act on its application for minor modification of the permit for the Homewood station that it had filed June 2, 1998. Homewood Radio states that its sole purpose was to seek guidance on the issuance of the permit and action on the modification application. It further maintains that there was no discussion of the merits or outcome of Damsky's Petition for Reconsideration or Motion for Stay and that counsel informed Riffer that it had no intention of raising matters prohibited by the ex parte rules. Homewood Radio asserts that counsel explained Homewood Radio's view that issuance of a construction permit following grant of an application, as opposed to the grant itself, is a ministerial act, and counsel inquired as to whether this point could be clarified with the Bureau. Even assuming arguendo that the meeting constituted an ex parte contact, Homewood Radio states, Damsky has not shown a basis for disqualification. In this regard, Homewood Radio attaches declarations from Ouida J. Fritschi, general partner of WEDA, and Willie R. Huff, president of Homewood Partners, who state that neither they nor

the Commission has acted upon Damsky's pending [May 22, 1998] Petition for Reconsideration and [June 1, 1998] Emergency Motion for Stay." In view of the Commission's August 25, 1998 Order, FCC 98-202, acting on these matters, Damsky's Application for Review is now moot.

²Pursuant to 47 C.F.R. § 1.1212(b), Commission personnel who receive ex parte presentations are required to prepare a statement and forward it to the Office of General Counsel.

any other principals of their applicants knew of the July 8 meeting until after it occurred.³ In these circumstances, Homewood Radio concludes, Damsky's Further Petition should be denied.

5. Damsky has not satisfied the traditional test for reopening a hearing record by showing that the new evidence, if true, would have a substantial decisional effect. See The News-Sun Broadcasting Co., 27 FCC 2d 61 (1971); Kaye-Smith Enterprises, 98 FCC 2d 670 (Rev. Bd. 1984), rev. denied, FCC 85-192, released April 19, 1985. Here, we find that the meeting in question, even though a prohibited ex parte contact, does not raise a substantial and material question as to Homewood Radio's qualifications.

6. In pertinent part, Riffer's July 9, 1998 memorandum states:

On July 8, 1998 at approximately 3:00 p.m., . . . counsel for WEDA . . . and Homewood Partners . . . came to my office, saying that they were aware of the ex parte restrictions applicable to this hearing case and that they wanted to discuss a matter that was not covered by the ex parte rules. Mr. Garziglia proceeded to tell me that he had talked to Mass Media Bureau staff and that the Bureau had said that it would not, in light of the motion for stay, issue a construction permit in the absence of clearance from the Office of General Counsel. Mr. Garziglia then said to me that he believed that there should be no impediment to the Bureau's issuance of a construction permit merely because of the filing of the motion for stay. I responded that I understood the question being raised, that I would check with others, and that I would get back to them with our response. . . . Our conversation concerning this matter lasted approximately 5-10 minutes.

On reflection, I believe that the question concerning the Bureau's issuance of a construction permit raised during my conversation with counsel is so closely related to the relief requested by the motion, which seeks to stay the effectiveness of the Commission's Memorandum Opinion and Order, that this conversation should be treated as an ex parte conversation.

7. The foregoing recitation is fully consistent with Homewood Radio's contention that counsel for WEDA and Homewood Partners did not attempt to discuss directly the merits or outcome of Damsky's Petition for Reconsideration or Emergency Motion for Stay in their July 8 meeting with Riffer. Counsel expressed the opinion at the meeting that the motion for stay did not pose a legal impediment to issuance of the construction permit and asked Riffer if this point could be clarified with the Bureau. Nevertheless, in spite of counsel's belief, and as explained in Riffer's statement, there was a close correlation between the question raised

³Attorneys acting on behalf of their FCC clients must adhere to our ex parte rules. See Rainbow Broadcasting Co., FCC 98-185, released August 5, 1998, ¶ 18.

regarding the appropriateness of issuing the permit and the substance of the stay motion, which sought to stay the effectiveness of the underlying Memorandum Opinion and Order approving the settlement agreement pending action on Damsky's Petition for Reconsideration. See 47 C.F.R. § 1.106(n) (Commission may stay effectiveness of its order pending decision on petition for reconsideration). Had we granted a stay, there would have been no basis for issuance of the permit. We believe this contact therefore constituted an ex parte presentation under 47 C.F.R. §1.1202(a), whether or not counsel meant to violate the rules. The communication, however, was not intended to influence our decision whether or not to grant the Petition for Reconsideration, and indeed, would not be relevant to the merits of the Petition for Reconsideration. It is clear from the facts, including the sworn declarations from Homewood Partners and WEDA, that none of their respective principals knew of or participated in the meeting between counsel and Riffer. Furthermore, this episode is an isolated event in the course of a lengthy proceeding. In view of these circumstances, we find that Damsky has not raised a substantial and material question that disqualification is warranted. Accordingly, there is no basis for addition of the requested issue. See Rainbow Broadcasting Co., FCC 98-185, released August 5, 1998 (even if counsel intended to violate ex parte rules, no disqualification where principals did not knowingly do so), notice of appeal filed, August 11, 1998; Pepper Schultz, 4 FCC Rcd 6393, 6403 (Rev. Bd. 1989) (and cases cited therein) (isolated ex parte contacts are not disqualifying), rev. denied, 5 FCC Rcd 3273 (1990).

8. In her Emergency Motion for Stay, Pendente Lite, Damsky requests that the Commission stay the effectiveness of the Order, FCC 98-202, which denied reconsideration of the Memorandum Opinion and Order approving the settlement agreement and disqualifying Damsky, until the United States Court of Appeals for the District of Columbia Circuit has acted on an appeal from these actions filed by Damsky on September 2, 1998. In opposition, Homewood Radio argues that Damsky has not satisfied the standards for obtaining a stay set forth in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958). Although it appears that Damsky has not met the applicable stay requirements, we need not decide this point at this time because Damsky's request is rendered moot by her Further Petition for Reconsideration, in which Damsky states that she will dismiss her court appeal because she is now seeking further reconsideration of the Commission's Order.

9. In her Further Petition for Reconsideration, Damsky requests that the Commission set aside its Order, declare that the winner of this proceeding will be selected by competitive bidding, and rule that Damsky is qualified to participate in the bidding. In support of her request, Damsky cites the Commission's First Report and Order, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 98-194, released August 18, 1998, petitions for recon. pending, for the proposition that all pending comparative cases must be decided by a system of competitive bidding. Specifically, Damsky relies on the language in ¶ 89 of the First Report and Order, as follows:

At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (e.g., when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction. Among those remaining in the proceeding, we will permit all pending applicants to participate in the auction, without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant. This serves the public interest by not delaying the selection of an auction winner to resolve potentially irrelevant issues. It also comports with Section 309(j)(5) of the Communications Act authorizing the prescription of expedited procedures for the resolution of any issues pertaining to the winning bidder's basic qualifications. It is more efficient to decide basic qualifying issues only against the winning applicant. (Footnote omitted).

Damsky asserts that the First Report and Order excludes from participation in future auctions only those applicants whose denial or dismissal has become final and that Damsky does not fall in this category because her initial Petition for Reconsideration was pending when the Commission released its decision. Finally, although she continues to dispute her financial disqualification in this proceeding, Damsky maintains that the First Report and Order also makes clear that she will not be required to demonstrate her financial qualifications if she is the successful bidder.

10. In opposition, Homewood Radio argues that Damsky's Further Petition for Reconsideration should be dismissed because it is unauthorized and repetitious. Furthermore, Homewood Radio contends that there are no unresolved questions remaining with regard to Damsky's financial qualifications and no more mutually exclusive applications that would require an auction. Homewood Radio also asserts that it would be contrary to congressional intent to hold an auction where none is necessary. Finally, Homewood Radio maintains that, if there were an auction, and Damsky made the winning bid, there would be further delay because of the need to examine whether Damsky falsely certified her financial qualifications.

11. We disagree with Damsky that the First Report and Order indicates that we must, or should, apply our new competitive bidding procedures to resolve this proceeding. As explained in the First Report and Order, Section 3002(a)(3) of the Balanced Budget Act of 1997 ("Balanced Budget Act"), Pub. L. No. 105-33, 111 Stat. 251 (1997), added Section 309(l) to the Communications Act of 1934. Section 309(l) authorizes the Commission to conduct competitive bidding proceedings with respect to competing applications for construction permits for new commercial broadcast stations that were filed before July 1, 1997. It is pursuant to this authority that the First Report and Order adopted procedures for competitive bidding to resolve these pending comparative licensing cases. Section 309(l) also provides, however, that, for a

180-day period, the Commission "shall waive any provisions of its regulations necessary" to permit these applicants to enter into settlement agreements. Thus, the statute also provides a 180-day window for competing applicants who filed before July 1, 1997 to remove voluntarily the conflict between their applications and encourages settlement through its waiver mandate. In accordance with this congressional intent, the other applicants in this case, Homewood Partners and WEDA, reached a settlement within the statutory framework of 47 U.S.C. § 309(l). The Commission's Memorandum Opinion and Order approving the settlement therefore obviates the need for an auction to resolve this proceeding unless the court of appeals ultimately reverses Damsky's disqualification. As we explicitly stated therein (at ¶ 8):

Thus, the settlement here would avoid mutual exclusivity and the potential need for competitive bidding to award the license, thereby falling squarely within the underlying purpose of the waiver provision.

12. Where, as here, the Commission has, in the context of considering a settlement agreement filed pursuant to Section 309(l) of the Act, adversely adjudicated a pending applicant's basic qualifications based on a review of the hearing record, it would serve no useful purpose to set aside that adverse determination and proceed to an auction that includes the disqualified applicant. Moreover, to do so would frustrate the intent of Congress as reflected in Section 309(l). Congress manifested an intent to afford applicants that had filed and litigated their applications under the old comparative system the opportunity to have their cases resolved without recourse to competitive bidding. To conduct an auction that would not otherwise be necessary and permit Damsky to participate would deny Homewood Partners and WEDA the relief that Congress intended to provide. See First Report and Order, ¶ 73. Our statement in ¶ 89 of the First Report and Order upon which Damsky relies was not intended to apply to such situations but rather to situations where an auction would otherwise be held because no settlements were reached.

13. It is clear from the context of our discussion that our intention was not to proceed to auctions where all qualifying applicants had settled. In the underlying Notice of Proposed Rulemaking, 12 FCC Rcd 22363, 22376 ¶ 29 (1997), we stated:

We also anticipate that many of the pending cases currently in hearing status, and some of the non-hearing cases, will be settled under the provisions of Section 309(l)(3). In the event that these cases are not settled, we believe it is appropriate to adopt special procedures to govern them.

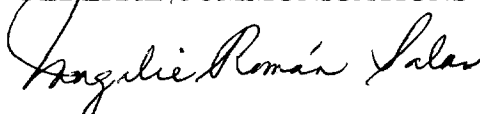
Under the topic heading entitled "Hearing Cases" in the Notice, we proposed pre-auction procedures "if no settlement has been filed within the 180 day period" and asked for comments on procedures to be utilized if a proposed settlement is denied. Id. at 22376 ¶ 30. The Commission's discussion in the First Report and Order under the section "General Rules and Procedures for Competitive Bidding" contains a subsection entitled "Pending Comparative Initial

Licensing Cases Subject to Section 309(l)." Thereunder there is a topic heading (at ¶ 71) entitled "Settlements," and a topic heading (at ¶ 78) entitled "White Knight Settlement Agreements." In contrast to these discussions of settlement issues, ¶ 89 is contained in a discussion under the topic heading (at ¶ 88) entitled "Special Auction Procedures for Frozen Hearing Applicants," which continues through ¶ 95. The latter paragraph specifically refers back to ¶ 30 of the Notice and prescribes the procedures to be followed if a settlement is denied or withdrawn prior to the deadline for short-form applications that applicants desiring to participate in the auction must submit. (In these circumstances, the Commission will follow the same procedures outlined for cases in which no settlement is filed during the 180-day waiver period.) Similarly under the topic heading (at ¶ 80) entitled "Special Auction Procedures for Frozen Non-Hearing Cases," which immediately precedes the discussion of procedures for frozen hearing cases, we expressly referred to cases that "did not settle under the special provisions of Section 309(l)(3)." In sum, it is evident that ¶ 89 was not addressing cases in which settlements were filed within the 180-day period and thereafter approved. We therefore deny Damsky's Further Petition for Reconsideration.

14. Because we have resolved this proceeding without the need for competitive bidding, we do not address what further showing Damsky would be required to make regarding her financial certification if she were the winning bidder. See First Report and Order, ¶ 99 (Commission will not adjudicate financial qualifications of winning bidder, but will consider unresolved issue of whether winner falsely certified financial qualifications). We also deny Damsky's Motion to Supplement Record, filed October 26, 1998, which requests that a Contingent Petition for Reconsideration filed by Homewood Radio with respect to the First Report and Order and an Opposition thereto filed by Damsky be made a part of the record and taken into account in this proceeding. These pleadings are not pertinent to, and would not materially assist, our resolution of this proceeding.

15. ACCORDINGLY, IT IS ORDERED, That the Further Petition to Enlarge Issues and to Remand For Further Hearing Proceedings filed July 29, 1998, the Further Petition for Reconsideration filed September 21, 1998, and the Motion to Supplement Record filed October 26, 1998 by Heidi Damsky ARE DENIED, and the Application for Review filed August 13, 1998 and the Emergency Motion for Stay, Pendente Lite filed September 14, 1998 by Heidi Damsky ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary